No 772

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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

_____Term.

No._____.

HORACE LEE BARTINDALE,

Petitioner.

Vs

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of Horace Lee Bartindale, respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

The above named, Horace Lee Bartindale, the petitioner herein, prays for a writ of certiorari to review the judgment of the Court of Appeals of the State of New York, the court of last resort of that State, affirming the judgment of the Appellate Division of the Supreme Court of the State of New York, held in and for the Second Judicial Department, which affirmed a judgment of conviction and sentence to imprisonment of the petitioner for a term, the minimum of which is not less than five years and the maximum, not more than ten years; and affirmed an order denying the motion of the petitioner for an order, vacating and setting aside the judgment of conviction; permitting the withdrawal of the plea of guilty to the indictment and substituting and reinstating the plea of not guilty and for a new trial. The petitioner was convicted by his plea of guilty in the County Court of the County of Rockland on the 2nd day of October, 1940. The order and judgment of the Court of Appeals of the State of New York were made the judgment of the County Court by the filing of the remittitur of said Court with the Clerk of the County Court, Rockland County, on the 18th day of November, 1940.

I.

The petitioner applies for certiorari upon the first ground that his plea of guilty to the indictment was brought about by the deceit, fraud and trickery of the district attorney and petitioner's counsel. That such acts rendered the plea involuntary in that had such acts not have been practised upon him, petitioner would not have been deprived of a trial on the merits.

The petitioner was indicted on or about the 27th day of June, 1939 by the Grand Jury of Rockland County, and charged with a violation of Section 690 of the Penal Law.(1) This indictment accused the petitioner of the commission of the crime of sodomy upon the person of one John Beckvermit Jr. On the 10th day of July, 1939, the petitioner, through his former counsel, pleaded not guilty to the indictment in the Rockland County Court before Hon. John A. Mckenna (fol[illegible]).

The trial of the petitioner was then set for July 17th, 1939 and because of the illness of Mr. Dorsey, the district attorney, was adjourned to September27th, 1939 (fol[illegible]). Subsequently petitioner retained as his attorney, William Pickens, Esq., and on October 2, 1939, the case came on for trial (fol[illegible]).

The petitioner's attorney and the district attorney completed the selection of the jury, when at or about 10:55 A.M. the Court declared a short recess (fol[illegible]). Mr. Pickens then left the courtroom with Mr. Dorsey, the district attorney, and they spoke together for about ten minutes (fol[illegible]). Mr. Pickens then returned and spoke with petitioner. He was advised that Mr. Pickens had spoken with the district attorney. The substance of the conversation between Mr. Pickens and Mr. Dorsey was that Mr. Dorsey told petitioner's counsel, that if petitioner were found guilty he would "be given the limit" which meant twenty years imprisonment. Mr. Pickens told petitioner that since petitioner was a colored person, and in view of the notoriety and publicity given the case, that he had been prejudged by the public and hence a verdict of guilty was inevitable. The petitioner was told by Mr. Pickens that Mr. Dorsey, the district attorney, had represented and promised to him that if petitioner would plead guilty, as a first offender, he would receive a suspended sentence. Petitioner, as a result of this expres-

ed promise and representation of the district attorney, that he would receive a suspended sentence, consented to a withdrawal of his plea of not guilty and substituted a plea of guilty to the indictment. (Fols. [illegible]).

Thereafter, on the 4th day of October, 1939, the petitioner was sentenced by the County Court, to an indeterminate sentence of not less than five years nor more than ten years in Sing Sing Prison (Fol.). Petitioner, because of the representation and promise made to his attorney by the district attorney that he would receive a suspended sentence if he pleaded guilty, took this sentence with great shock and surprise. He had always maintained his innocence and was at all times reluctant to withdraw his plea of not guilty.

Petitioner, immediately thereafter retained other counsel and moved the County Court for an order vacating and setting aside the judgment of conviction, withdrawing the plea of guilty and reinstating the plea of not guilty and for a new trial. Petitioner's contention is that under the circumstances, his plea of guilty was an involuntary one. It was brought about solely by the fraud, deceit and trickery of the district attorney and petitioner's counsel. That the circumstances were such that petitioner's free will and judgment was overreached to such an extent that he was deprived of the right to a trial on the merits.

The motion subsequently made to withdraw this plea was opposed on the ground that the County Court had no jurisdiction or power to allow the plea to be withdrawn under the decisions of the Court of Appeals construing Section 337 of the Code of Criminal Procedure. This Section is discussed at pages 4-6 of the brief in support of this petition.

That the action of the district attorney and petitioner's counsel effected a denial of petitioner's rights guaranteed under the Fourteenth Amendment to the Constitution of the United States was raised in the lower courts and was asserted and preserved by the petitioner in his appeal to the Court of Appeals of the State of New York.

II.

Petitioner's second ground for this application for certiorari rests upon the proposition that the proceedings had in this case and the action inducing the withdrawal of the plea of not guilty by the petitioner was in effect a flagrant denial of petitioner's right to counsel.

Petitioner had at all times steadfastly maintained his innocence even at the time when he was told by his counsel of the expressed representation and promise by the district attorney that if petitioner pleaded guilty he would receive a suspended sentence. The effect of such promise and representation to petitioner's counsel denied to petitioner the right to appear and defend in person and with counsel as a party accused. Petitioner's right to counsel implies the right to the advice of counsel uninfluenced by false and untrue representations.

Therefore, the action by the State by its agent was contrary to the fundamental principles of liberty and justice, and that the whole proceeding was a wrong so fundamental that it rendered the conviction and sentence of the petitioner wholly void under the rights guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

III.

The petitioner's third main ground for this application for certiorari rests further upon the proposition that the action of the County Court, in summarily disposing of petitioner's contentions as to the circumstances concerning his plea of guilty without affording him the right and opportunity of proving them in open court, was in effect a denial of the opportunity to be heard, in violation of the rights guaranteed to him under the Fourteenth Amendment to the Constitution of the United States.

Petitioner retained different counsel to make the motion to set aside the judgment of conviction, withdraw the plea of guilty and substitute and reinstate the plea of not guilty. This application was based upon the facts concerning which the plea was made. It was made upon the affidavit of the petitioner, verified under oath. This motion

was heard and decided by the County Court on the papers and on the argument of counsel alone. (R p 70). The issues created by the moving and opposing affidavits created a grave issue. A request was made by counsel to have the petitioner in open court so that a full and complete hearing might have been had to determine the truth of the allegations in the moving papers (R p 74). This request was denied in that the County Court should have set the motion down for a hearing so that petitioner might produce witnesses and be present himself to prove this grave issue involving his personal liberty.

This action deprived the petitioner of his right to liberty under the Fourteenth Amendment to the Constitution of the United States.

B.

Reasons Relied on for the Allowance of the Writ

I.

That the plea of guilty by the petitioner to the indictment was brought about by the deceit, fraud and trickery of the district attorney and petitioner's counsel thereby rendering such plea involuntary and void, in that had such acts not been practiced upon him, petitioner would not have been deprived of a trial on the merits. Hence the conviction and imprisonment of the petitioner (which judgment was affirmed by the court of last resort of this State) is void as having been rendered in contravention of the Fourteenth Amendment to the Constitution of the United States.

II.

That the effect of such action by the district attorney was in effect a flagrant denial of petitioner's right to counsel, hence a deprivation of petitioner's right to life and liberty without due process of law under the Fourteenth Amendment to the Constitution of the United States.

III.

That the action of the County Court in summarily disposing of petitioner's contentions as to the circumstances concerning his plea of guilty without affording him the right to prove them in open court was in effect a denial of the opportunity to be heard in contravention of the Fourteenth Amendment to the Constitution of the United States.